IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 30TH OCTOBER 2006 / 8TH KARTHIKA 1928

ST.Rev..No. 135 of 2004

TA.269/2002 of S.T.A.TRIBUNAL,ADDL.BENCH,KZD.
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REVISION PETITIONER/APPELLANT/ASSESSEE:

M/S. BHIMA JEWELLERS, KOZHIKODE.

BY ADV. SRI.K.B.MUHAMED KUTTY
SRI.K.M.FIROZ

RESPONDENT/ RESPONDENT/REVENUE:

STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER (SHRI GEORGEKUTTY MATHEW)

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 30/10/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C. N. RAMACHANDRAN NAIR &
K. M. JOSEPH, JJ.

S.T.REV. NO. 135 OF 2004

Dated this the 30th day of October, 2006

JUDGMENT

C. N. Ramachandran Nair, J.

Question raised is whether the Sales Tax Appellate Tribunal is justified in upholding the suo motu revisional order of the Deputy Commissioner under Section 35(1) of the KGST Act, cancelling the original assessment of petitioner completed at compounded rate under Section 7(1)(a) of the KGST Act, and ordering regular assessment. The facts leading to the dispute are the following:

Petitioner by agreement dated 28.9.2000 took a building in a commercially important area at Kozhikode on long term lease for ninetynine years on a monthly rent of Rs.35,000/= with an undertaking to pay security deposit of Rs.45 Lakhs and in fact commenced full-fledged business in gold jewellery in the said building after wide advertisement on 22.8.2001. However,

before starting regular business, petitioner had taken a room in the third floor of a building and took registration under the KGST Act and started business from 19.2.2001 onwards with a stock of 1260.430 grams of gold. Petitioner reported a turnover of Rs.5,41,682/36 for the year 2000 - 2001 i.e. for carrying on business from 20.2.2001 to 31.3.2001. Thereafter, petitioner applied for permission to pay tax at compounded rate for the year 2001 - 2002 in terms of Section 7(1)(a) of the KGST Act read with Rule 30 of the KGST Rules. The rate of tax payable at compounded rate during the year 2001 - 2002 was 150 per cent of the tax payable by the dealer as conceded in the return or Accounts for the immediate preceding year. Assessing Officer accepted the claim and granted permission to petitioner to pay tax at compounded rate for the year 2001 - 2002 by issuing Form 21A prescribed under Rule 30 of the KGST Rules. The Deputy Commissioner, however, noticed that petitioner had not commenced business in the preceding year i.e. 2000 - 2001 and on the basis of enquiry conducted, the Deputy Commissioner of

Sales Tax found that petitioner had not really carried on business during the preceding year and the registration taken and the business shown to have been carried on were only make-believe to avail the benefit of tax for the subsequent year when petitioner commenced real business. Even though the assessee objected against the proceedings initiated under Section 35(1) of the KGST Act by filing a writ petition in this Court, this Court disposed of the writ petition, O.P. No.8531/02 holding that the Deputy Commissioner is free to conduct detailed enquiry and he is free to continue proceedings if the petitioner is not found to have been engaged in real business during 2000 - 2001, but the effort was only to reduce tax liability for the subsequent year. This Court in the said Judgment made the following observation:

> *"The business run by a reputed firm like this in retail business in gold should be borne out by evidence on investments in show room, rent deed, deposits, giving advance rent payment,*

advertisements, number of employees engaged, number of bills raised, turnover achieved, stock held etc... After investigation, if the Deputy Commissioner finds that there was no retail business started, but such a show with a small quantity of over 1 Km of gold was only a make believe for availing the compounding benefit, he is free to take action, if the same is permissible under Section 35...."

2. In the course of enquiry pursuant to the observation of this Court, the Deputy Commissioner found that during the preceding year, petitioner had made only the following sales:

"1)	*Naasser, Calicut*	*8.3.2001*	*Rs. 8,436/=*
2)	*Yasser, Calicut*	*8.3.2001*	*Rs. 6,043/=*
3)	*Shameer, Calicut*	*9.3.2001*	*Rs. 11,232/=*
4)	*Vinod Kumar, Calicut*	*9.3.2001*	*Rs. 4,974/=*
5)	*Harikumar, Calicut*	*10.3.2001*	*Rs. 7,041/=*
6)	*Bhima Jewellery, Tvpm.*	*14.3.2001*	*Rs.2,62,776/=*
7)	*Bhima Jewells, Ernakulam*	*14.3.2001*	*Rs.2,61,328/="*

3. From the above, it is clear that the total sales turnover

achieved in the course of business for part of the year was Rs.5,61,840/50 out of which Rs.5,24,104/88 represents sales to two sister concerns of the very same petitioner. In other words, the balance transactions are five in number totalling a turn of around Rs.36,000/=. It is to be noted that the period of business for 2001 - 2002 was only for seven days from 8.3.2001 to 14.3.2001. Further, it was noticed that the claim of petitioner that business commenced on 19.2.2001was obviously a false statement because first time gold was purchased for making new ornaments only on 27.2.2001. The further enquiry by the Deputy Commissioner revealed that much before the so-called purported commencement of business, petitioner had made arrangements to take a show room in an important area and made massive investment for commencement of the business which was in fact commenced with effect from 22.8.2001 with much publicity and advertisement, details of which are furnished in Annexure C. The Deputy Commissioner conducted an enquiry in terms of the observation in the above Judgment and found that during the

year 2000 - 2001 petitioner had no expenses on advertisement and no salary was paid to any employee. Even though the Deputy Commissioner has not stated in his order, it is seen from tribunal's order that on departmental enquiry, they found that the building where the business was claimed to be carried on in 2000 - 2001 by petitioner was, in fact, used for the stay of employees who were engaged in furnishing work of the new show room where the petitioner actually started business on 22.8.2001. Based on the above findings, the Deputy Commissioner held that the order of Assessing Officer granting permission to petitioner to pay tax at compounded rate for the year 2001 - 2002 based on the tax liability of the preceding year, is absolutely erroneous and prejudicial to the interest of Revenue and, therefore, he cancelled the said proceedings which obviously authorises regular assessment for the year 2001 - 2002. Even though petitioner contested the order of Deputy

Commissioner in appeal, the tribunal by majority decision, dismissed the appeal, against which this S.T.Rev. is filed.

4. We heard learned senior counsel Dr. K.B. Mohamed Kutty appearing for petitioner and the learned Government Pleader appearing for the Revenue.

5. From the proved facts, the tribunal came to the conclusion that the so-called business carried on by petitioner during the previous year was not a genuine business, but was only a make-believe to reduce tax liability for the subsequent year when the petitioner started full-fledged business in a proper show room. The tribunal accordingly confirmed the suo motu revision of the Deputy Commissioner under Section 35 of the KGST Act. Counsel appearing for petitioner referred to the dissenting order issued by one of the Members of the Tribunal and submitted that petitioner was granted registration during the preceding year and was carrying on business, though the volume

of business achieved was very low. We are unable to accept this contention because in the first place, petitioner had chosen their real place of business during 2000 - 2001 itself and started furnishing it. The facts disclosed prove that the room taken in which registration was taken during 2000 - 2001 was used for the residence of the employees engaged in furnishing of the new show room and the petitioner accounted only five petty cash sales in gold jewellery during the year 2000 - 2001. The two major transactions are to sister concerns which are also accounted as cash sales. In fact, these two sister concerns are located 200 and 400 kilometres away from petitioner's place of business. Obviously, the transactions are not real sales because the petitioner was admittedly engaged in retail sale of jewellery and not bulk sales. Strangely, no purchase is accounted during the year 2000 - 2001 and the source of the stock is not also explained. In such circumstances, the only inference possible is what is drawn by the Deputy Commissioner that petitioner was not really engaged in business, but was accounting some

transactions only to reduce tax liability for succeeding year by resort to the compounding facility provided under Section 7(1)(a) of the KGST Act. In fact, the benefit of Section 7(1)(a) will be available only if the dealer had carried on business during the preceding year. What is required is a genuine business and not a make-believe by accounting some transactions as is found in this case. It is pertinent to note that the Supreme Court has in the decision in McDowell & Company Limited v. Commercial Tax Officer ((1985) 59 STC 277), has stated the need to look at the real motive behind devices adopted by dealers to avoid tax. Since the facts proved beyond doubt that the petitioner did not really carry on business during the year 2000 - 2001, we cannot uphold the contention of petitioner that the so-called accounting of petty sales should be treated as real business, more so when the place of business where the business was stated to be carried on during 2000 - 2001 was used as a room for residence of employees. Further, the findings pertaining to the full-fledged business started by petitioner with all publicity and

advertisement in a well furnished show room on 22.8.2001 would establish beyond doubt that the real business was commenced only in the year 2001 - 2002, and not before as claimed by assessee. We, therefore, confirm the order of the tribunal and dismiss the S.T.Rev.

C. N. RAMACHANDRAN NAIR, JUDGE

K. M. JOSEPH, JUDGE

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